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**IN THE  
COURT OF APPEALS OF INDIANA**

STEVEN T. GERBER,  
Appellant-Petitioner,

VS.

INDIANA DEPARTMENT OF NATURAL  
RESOURCES,

Appellee-Respondent.

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No. 02A05-0605-CV-228

APPEAL FROM THE ALLEN SUPERIOR COURT  
The Honorable David J. Avery, Judge  
Cause No. 02D01-0506-PL-252

**April 10, 2007**

## **MEMORANDUM DECISION - NOT FOR PUBLICATION**

**FRIEDLANDER, Judge**

The Indiana Department of Natural Resources (the DNR) terminated Steven T. Gerber's employment as a conservation officer with the DNR. Gerber was provided with a predeprivation hearing, a full evidentiary hearing before an administrative-law-judge panel (the ALJ panel), and an appeal before the Natural Resources Commission (the Commission). At each stage of the administrative review process, the decision to terminate Gerber was upheld. Thereafter, Gerber sought judicial review of the agency action. The court affirmed Gerber's termination, and Gerber now appeals, claiming the Commission's decision was arbitrary and capricious because the DNR failed to comply with its own procedures relating to employee discipline.

We affirm.

On November 9, 1980, Gerber began employment with the DNR. Gerber's commander, Lt. Ralph Taylor, issued a statement of charges on July 19, 2001, which alleged eight instances of misconduct and/or insubordination and recommended termination of Gerber's employment. After being served with the statement of charges, Gerber was suspended from duty on July 25, 2001, pending the outcome of the termination proceedings. A predeprivation hearing was held on August 8, 2001, and soon thereafter, Gerber was terminated.

On August 21, 2001, Gerber sought administrative review of his termination. After an attempt at mediation failed, an evidentiary hearing before the ALJ panel was

held on May 29, 2003. On April 2, 2004, the ALJ panel issued its Report, Findings of Fact, and Non-Final Order. Of the eight instances of misconduct and/or insubordination alleged by the DNR, the ALJ panel found that the evidence supported only four charges of insubordination. These included: 1) removing the air deflector from his commissioned vehicle without written approval; 2) varying from his assigned work hours without notification or approval to do so; 3) disobeying a direct order by failing to inform his supervisor prior to attending a meeting he arranged with individuals suspected of illegal activity, with whom he had become acquainted on the Internet; and 4) failing to comply with a directive given by a superior officer, on two occasions, to produce a tape recording that contained evidence relevant to an investigation of the DNR Law Enforcement Division that involved Gerber. Based on these four instances of insubordination, the ALJ panel affirmed the DNR's termination of Gerber. Thereafter, on May 17, 2005, the Commission affirmed and adopted the ALJ panel's report, findings of fact, and nonfinal order, with only minor technical and clerical modifications.

Gerber filed his Verified Petition for Judicial Review on June 15, 2005 and subsequently filed a lengthy Judicial Review Brief. In his brief, Gerber addressed two distinct issues. Initially, Gerber challenged the factual basis supporting each of the four instances of insubordination. Specifically, in this regard, he claimed that the findings were unsupported by substantial evidence and that the Commission's action was arbitrary and capricious because it ignored crucial testimony. As a separate ground for relief, Gerber asserted that he was denied his constitutional right to due process when the DNR failed to follow its own standard operating procedures (SOP) regarding discipline.

Following a hearing, the court affirmed the decision of the Commission. Gerber now appeals. Additional information will be provided below as necessary.

We must initially address Gerber's complete failure to include any portion of the administrative record in his appendix.<sup>1</sup> The purpose of an appendix in an appeal from an administrative agency determination is to present this court with copies of those parts of the record on appeal that are necessary for us to decide the issues presented. *See* Indiana Appellate Rule 50(a)(1). "It is the duty of an appellant to provide this court with a record sufficient to enable us to review the claim of error". *Lenhardt Tool & Die Co., Inc. v. Lumpe*, 703 N.E.2d 1079, 1084 (Ind. Ct. App. 1998), *trans. denied*. App. R. 50(a)(2) provides that the appellant's appendix shall include, among other things, "(h) any record material relied on in the brief unless the material is already included in the Transcript". While he relies almost exclusively on material from the administrative record to support his arguments on appeal, Gerber has failed to include any such material in his appendix. This is highly improper and could have entirely impeded our review. *See Hughes v. King*, 808 N.E.2d 146, 147 (Ind. Ct. App. 2004) (review of substantive issue raised on appeal precluded due to appellant's noncompliance with App. R. 50; "[a]lthough we prefer to dispose of cases on their merits, where an appellant fails to substantially comply with the appellate rules, then dismissal of the appeal is warranted"). We observe, however, that the DNR remedied this deficiency by including the majority of the omitted

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<sup>1</sup> Gerber's appendix includes only the following items, all relating to the judicial review action: 1) The chronological case summary; 2) the court's order of judgment; 3) Gerber's petition for judicial review; 4) Gerber's judicial review brief; 5) the DNR's response brief; and 6) the DNR's post-hearing brief.

record material in its appendix. Therefore, though still hampered by Gerber's actions, we will proceed with our review.

As the party asserting invalidity of agency action, Gerber bears the burden to demonstrate invalidity upon judicial review. *See* Ind. Code Ann. § 4-21.5-5-4(a) (West 2002). A court may grant relief on judicial review only if it determines that the party seeking judicial relief has been prejudiced by an agency action that was:

- (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
- (2) contrary to constitutional right, power, privilege, or immunity;
- (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
- (4) without observance of procedure required by law; or
- (5) unsupported by substantial evidence.

I.C. § 4-21.5-5-4(d).

On appeal, Gerber abandons his evidentiary challenges regarding the four instances of insubordination. His only argument on appeal is that the DNR failed to follow several of its SOP regarding employee discipline. We note that each of the alleged failures occurred during the initial disciplinary stages and prior to administrative review.<sup>2</sup>

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<sup>2</sup> His primary complaint is that the DNR failed to comply with SOP 9-13, which establishes "guidelines for receiving and investigating complaints of employee misconduct." *Appellee's Appendix* at 75. He notes that in two of the instances of insubordination an Employee Misconduct Recommended Disposition Report was completed but not properly forwarded through the chain of command, and with respect to the two other instances, such a report was never initiated. Gerber also complains, pursuant to SOP 26-1F, that the DNR failed to provide him with an informal review hearing before a board of captains, which apparently would have occurred prior to the predeprivation hearing and prior to his actual termination. Finally, once again relying on SOP 9-13, he complains that the DNR failed to purge certain disciplinary matters more than two years old from his record. We note that although these prior disciplinary actions were referenced in the recommendation portion of the statement of charges, they did not constitute the charges against Gerber and were not referenced in the Commission's report.

In this regard, the court below made the following findings and conclusions:

46. With regards to the process of Gerber's termination by the DNR, Gerber has been afforded procedural due process. Gerber was presented with a Statement of Charges. A pre-deprivation hearing was conducted. Gerber was permitted to appeal his termination. Gerber was present, in person and counsel [sic], at the hearing before the ALJ Panel. At the hearing, Gerber presented evidence and conducted cross-examination of witnesses. Gerber was permitted to appeal the findings of the ALJ Panel.

47. Even assuming that there may have been some failure on behalf of the DNR to comply with SOP concerning disciplinary procedures [footnote 4], such failure does not constitute a violation of Gerber's right of procedural due process as to the procedures utilized by the DNR in making the decision to terminate Gerber and Gerber's administrative appeal of that decision.

*Appellant's Appendix* at 17. In footnote 4, the court went on to state:

The Court does not make any determination that the DNR did, or did not, comply with SOP concerning the disciplinary actions taken against Gerber concerning the four instances of insubordination that Gerber was alleged to have committed. The Court does not see these as being relevant as to whether Gerber was afforded procedural due process as to the DNR's decision to terminate Gerber. The procedural due process afforded to Gerber by DNR was an appropriate and constitutionally valid process to contest the DNR's decision to terminate his employment.

*Id.*

The DNR similarly argues on appeal (as it did below) that its alleged noncompliance with SOP did not amount to a violation of Gerber's due process rights. Further, the DNR observes that while Gerber asserts several violations of SOP during the internal disciplinary process, he does not allege on appeal that the omissions denied him due process.

In response, Gerber argues:

The DNR fails to acknowledge that the decision of an agency which has not followed its own rules is arbitrary and capricious. Its attempt to characterize the case as one of Gerber not having been denied procedural or substantive due process is an attempt to obscure the true issue in the case. That issue is whether an agency which adopts comprehensive rules relating to employee discipline is free to ignore them.

*Reply Brief of Appellant* at 1. He then goes on to rebuke the DNR for devoting its appellate brief to due process issues, and he explains that the DNR has “failed to understand that there is a difference between an agency failing to following [sic] the rules and SOPs it has adopted and a denial of due process.” *Id.* at 2. In sum, instead of due process, Gerber makes clear that the basis of his appeal is that “[t]he failure of the DNR to follow its own rules and SOPs made the decision arbitrary and capricious.” *Id.* at 3.

There is a fundamental problem with Gerber’s novel appellate argument – it was not raised below. As reflected in Gerber’s judicial review brief, he consistently argued to the judicial review court that, with respect to the DNR’s failure to follow SOP, his constitutional rights to due process had been violated.<sup>3</sup> *See e.g., Appellant’s Appendix* at 61 (“the failure of the Department to follow SOP policy denied Gerber his constitutional rights to due process”); *id.* at 64 (“the failure of the Department to follow its written guidelines...is in violation of Gerber’s constitutional rights to due process”); *id.* at 66 (“as argued above, Gerber’s constitutional rights to due process were violated when the

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<sup>3</sup> As noted previously, Gerber also challenged the factual basis supporting the four instances of insubordination, arguing that the Commission’s findings were unsupported by substantial evidence (with regard to each instance of alleged insubordination) and that the decision was arbitrary and capricious because the Commission ignored crucial testimony (with respect to two of the instances of alleged insubordination). Gerber does not assert these alternative claims of error on appeal. Moreover, at no time did he argue below that the Commission’s decision was arbitrary and capricious simply because the DNR failed to follow SOP during the initial disciplinary process. Rather, as set forth above, Gerber asserted only a due process claim regarding the failure to follow SOP.

Department failed to follow SOP 9-13”); *id.* at 67-76 (section of Gerber’s judicial review brief dedicated to the denial of his constitutional rights to due process by the DNR’s failure to follow its own written disciplinary policies). Likely because his due process argument failed below, Gerber now attempts to wholly recast the issue. This belated attempt to effectively raise a new issue is improper and, therefore, the issue is waived.<sup>4</sup> *See Stainbrook v. Low*, 842 N.E.2d 386, 396 (Ind. Ct. App. 2006) (“the Estate raises these issues for the first time on appeal, so they are accordingly waived”), *trans. denied*.

Judgment affirmed.

KIRSCH, J., and RILEY, J., concur.

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<sup>4</sup> Even if we were to reach the merits, Gerber would not prevail. His argument seems to be that because the DNR failed to strictly follow SOP with respect to the initial disciplinary matters, the agency is foreclosed from taking any further disciplinary action and the subsequent decision of the Commission is necessarily arbitrary and capricious. Without any showing of actual prejudice or a due process violation, we fail to see how this can be so. And the patchwork of authority Gerber relies upon does not adequately support his broad assertions.